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No. 84-6780

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

WILLIAM ALVIN SMITH,

Petitioner

-against-

ROBERT O. FRANCIS, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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No. 84-6730

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

WILLIAM ALVIN SMITH,

Petitioner

-against-

ROBERT O. FRANCIS, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

ARGUMENT

I. The Decision Below on Petitioner's Eighth Amendment Claim Does Not Rest on an Adequate and Independent State Ground.

Respondent does not deny that petitioner's cruel and unusual punishment claim presents an unresolved federal question of fundamental importance. Respondent argues, however, that the decision below on this claim rests on an adequate and independent state ground. According to respondent, the Georgia Supreme Court denied the claim pursuant to a state procedural rule that issues reviewed on direct appeal will not be reviewed again in state habeas corpus proceedings.

Even on its own terms, respondent's argument is fatally flawed by the concession that petitioner's claim was rejected on its merits at an earlier stage of this litigation. For as this Court has said, "It has long been established, however, that '[w]e have jurisdiction to consider all of the substantial federal questions determined in the earlier stages of [state proceedings], . . . and our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case. . . .'" Hathorn v. Lovorn, 457 U.S. 255, 261 (1982), citing Reece v. Georgia, 350 U.S. 85, 87 (1955).

More important, the Georgia Supreme Court almost certainly did not deny petitioner's claim in the habeas corpus appeal on the procedural ground that respondent cites. To the contrary, it is virtually certain that the court below reached the merits of that claim. For on direct appeal from his conviction, petitioner did not raise his current claim that it is cruel and unusual punishment to inflict the death penalty on a mentally retarded offender for an unpremeditated homicide.[1/] Quite understandably, therefore, the Georgia Supreme Court did not review that claim when it decided the appeal.[2/] The court did review petitioner's death sentence, as

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1/ See the Brief on Behalf of Appellant filed on petitioner's behalf in his direct appeal to the Georgia Supreme Court, reproduced in Appendix A to this Reply.

2/ The opinion of the Georgia Supreme Court affirming petitioner's conviction, Smith v. State, 249 Ga. 228, 290 S.E.2d 43 (1982), is reproduced in Appendix B to this Reply.

it routinely does in all capital cases, and it did conclude that the sentence was "not excessive or disproportionate to the penalty imposed in similar cases," 249 Ga. at 235, 290 S.E.2d at 48-49. This conclusion was not, however, based on any evaluation whatsoever of the Eighth Amendment significance of petitioner's mental retardation. The court's opinion therefore cannot reasonably be read to encompass a review of the cruel and unusual punishment claim that petitioner subsequently advanced.[3/]

Petitioner raised that claim for the first time in the habeas corpus proceeding before the Superior Court of Butts County, Georgia.[4/] (Under Georgia law at the time, petitioner was entitled to raise issues in habeas corpus that had not been specifically preserved in the underlying proceeding.) Respondent contested the claim on its merits, and without suggesting that it had already been decided on direct appeal.[5/] Similarly, in the habeas corpus appeal, petitioner continued to focus on the merits of his cruel and unusual

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3/ Thus, respondent's suggestion, at page 5 of his Brief in Opposition to the Petition for a Writ of Certiorari, that "[t]his issue would have been more properly raised in the Petitioner's first petition for certiorari to this Court upon the affirmance of his conviction and sentence by the Supreme Court of Georgia in 1982" is absolutely untenable in light of this history.

4/ Appendix G to the Petition for a Writ of Certiorari contains the section of the habeas corpus petition in which the cruel and unusual punishment claim first appeared. In addition, petitioner devoted a substantial portion of his post-hearing brief in the Superior Court to that claim. See pages 69-83 of Petitioner's Memorandum of Law in Support of Petition for a Writ of Habeas Corpus, reproduced in Appendix C to this Reply.

5/ See pages 18-19 of the Post-Hearing Brief on Behalf of the Respondent, reproduced in Appendix D to this Reply.

punishment claim[6], and respondent continued to answer it solely on the merits, without invoking any procedural bar to review.[7]

The Superior Court denied the Eighth Amendment claim on the ground that the Georgia Supreme Court had "already concluded that Petitioner's death sentence is not excessive or disproportionate."[8] Respondent construes this to mean that the Superior Court declined to reach the issue on the merits because of an adequate and independent state procedural ground. In affirming, however, the Georgia Supreme Court merely upheld without explanation the "conclusion" that this issue, among others, did not "merit relief." Smith v. Francis, 253 Ga. 782, 787, 325 S.E.2d 362, 366 (1985). The court did not explicitly adopt the Superior Court's reasoning, nor did it otherwise advert to any procedural bar to review of the issue on the merits.

Since on direct appeal the Georgia Supreme Court clearly did not review petitioner's Eighth Amendment claim, it is highly implausible that in the habeas corpus appeal the same court held the claim unreviewable on the patently erroneous ground that such prior review had taken place before it. This is particularly implausible given that respondent did not ask the court to so

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6/ See pages 31-45 of petitioner's Application for Certificate of Probable Cause, reproduced in Appendix E to this Reply, and pages 14-15 of the Brief for Appellant, reproduced in Appendix F to this Reply.

7/ See pages 8-9 of the Brief on Behalf of the Appellee by the Attorney General, reproduced in Appendix G to this Reply.

8/ Order at 29, reproduced in Appendix B to the Petition for a Writ of Certiorari.

hold, but instead addressed petitioner's claim on the merits.[9/] By far the only reasonable explanation of the concededly cryptic language of its opinion is that the Georgia Supreme Court rejected the cruel and unusual punishment claim on the merits, and not because of any obviously inapplicable state law procedural bar.

Since the decision below on petitioner's claim does not clearly and unambiguously rest on an adequate and independent state law ground, what this Court said in Michigan v. Long, ____ U.S. ____, 103 S.Ct. 3469, 77 L.Ed. 2d 1201 (1983), disposes of respondent's contention:

> Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

103 S.Ct. at 3476 (emphasis added). "[A]mbiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940).

9/ The implausibility is only heightened further by the fact, which we discuss infra, that the court below did address on the merits another of petitioner's claims which clearly was reviewed previously on direct appeal. In doing so, moreover, the court did not discuss any procedural barriers to review.

Furthermore, respondent's state procedural "rule" would not constitute an adequate and independent state ground even if it could somehow be demonstrated that the Georgia Supreme Court did rely on it. A state procedural ground is not adequate when the procedural rule is not "strictly or regularly followed." Barr v. City of Columbia, 378 U.S. 146, 149 (1964). "State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply even handedly to all similar claims." Hathorn v. Lovorn, 457 U.S. at 263. That the Georgia Supreme Court does not consistently apply the procedural rule cited by respondent was demonstrated in that court's opinions in this very case.

On direct appeal from his conviction, petitioner challenged the constitutional adequacy of the trial court's jury instructions on mitigating circumstances,[10/] and the Georgia Supreme Court upheld those instructions on the merits. Smith v. State, 249 Ga. at 22, 290 S.E.2d at 44-45. In his habeas appeal, petitioner again challenged the same instructions on the same grounds. Although the court even cited its earlier discussion, it nonetheless addressed the issue again on the merits. Smith v. Francis, 325 S.E.2d at 364-366. The Georgia Supreme Court made no reference to any rule barring consideration of an issue already reviewed on direct appeal.

Nor was this an isolated instance of a departure from the "rule." For example, in Berryhill v. Ricketts, 242 Ga. 447, 249 S.E.2d 197 (1978), a habeas corpus appeal, the Georgia Supreme

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10/ See Appendix A to this Reply.

Court considered on their merits two issues -- concerning a restriction on the timing of an opening statement, and the admission of an incriminating statement elicited by the police in the absence of counsel -- that it had concededly already reviewed on direct appeal.[11/] Again, the court did not cite, let alone invoke, any procedural bar to the reconsideration of these issues.

To be adequate, a state procedural rule must not only be consistently applied, it must also be fairly applied. "Even though the claimed constitutional protection be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not thus be avoided. ...[C]onstitutional rights [may be] denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it." Lawrence v. State Tax Commission, 286 U.S. 276, 282 (1932). The state procedural rule thus must be "a reasonable one and clearly announced to defendant and counsel." Henry v. Mississippi, 379 U.S. 443, 448 n.3 (1965). These criteria were clearly violated if a rule precluding consideration of issues previously reviewed on direct appeal was unpredictably applied to petitioner's Eighth Amendment issue, which was indisputably not reviewed on direct appeal.

It is no doubt unfortunate that both the Superior Court and the Georgia Supreme Court saw fit to deny petitioner's cruel and unusual punishment claim without discussing its merits. Those courts'

11/ See Berryhill v. State, 235 Ga. 549, 221 S.E.2d 185 (1975).

evasion of a serious Constitutional question, properly raised and pressed by petitioner, was not justified by any legitimate state procedural rule. The manner in which the court below ruled on the question therefore cannot be used to bar this Court's review.

II. Respondent's Arguments in Support of the Jury Instructions Regarding Malice and Intent Were Squarely Rejected by this Court in Francis v. Franklin.

Respondent argues that the Superior Court, the Georgia Supreme Court and the Eleventh Circuit Court of Appeals have all interpreted the challenged malice and intent instructions in this case to be, at least in context, nothing more than "a directive to the jury that the finding of malice must often be based entirely on circumstantial evidence, that is that the jury was not entitled to refuse to find malice solely because direct evidence of malicious intent is lacking."[12/] In making this argument, respondent simply ignores this Court's recent decision in Francis v. Franklin, 471 U.S. ___, 105 S.Ct. ____, 85 L.Ed.2d 344 (1985). "The question ... is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning." 85 L.Ed.2d at 354.

As in Franklin, here too "[t]he challenged sentences are cast in the language of command." Id. For example, the trial court instructed petitioner's jury that "[m]alice shall be implied." (T.T. at 336; emphasis added.) Respondent contends that other portions of the charge transformed the impact of this language so

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12/ Brief in Opposition for the Respondent at 9.

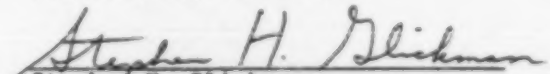
that it merely created a permissive inference. Yet respondent is able to specify no language in the rest of the charge that could have had this effect. It is now settled that general instructions concerning the state's burden of proof, the presumption of innocence, and the evaluation of circumstantial evidence do not save a charge which also contains unconstitutional burden-shifting language. Franklin, 85 L.Ed.2d at 356-360.

In short, the decision below upholding the jury charge on malice and intent at petitioner's trial is irreconcilable with Franklin. Respondent does not argue that the error was harmless, nor was it.[13/] Particularly since petitioner's life is what is at stake, the patent error should be corrected.

CONCLUSION

Petitioner respectfully submits that this Court should issue the requested writ of certiorari to decide both questions presented by his Petition.

Respectfully submitted,



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13/ See the Petition for a Writ of Certiorari at 20-21.

APPENDIX A

593
to 1

IN THE SUPREME COURT

OF THE STATE OF GEORGIA

ORIGINAL

CASE NO. 38247

WILLIAM ALVIN SMITH,

Appellant

-vs-

STATE OF GEORGIA,

Appellee

BRIEF ON BEHALF OF APPELLANT

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IN THE SUPREME COURT OF

THE STATE OF GEORGIA

WILLIAM ALVIN SMITH,	)	
	)	
Appellant	)	CASE NO. 38247
	)	
-v-	)	
	)	
STATE OF GEORGIA,	)	
	)	
Appellee	)	

BRIEF ON BEHALF OF APPELLANT

PART I

STATEMENT OF FACTS

William Alvin Smith, the Appellant, was indicted by the Oglethorpe County Grand Jury for the June 8, 1981 murder and armed robbery of Mr. Dan Turner at his grocery store in Lexington, Georgia (R.3). He entered his plea of not guilty on September 1, 1981 (R.62) and was tried by a jury in Oglethorpe County on the 14th and 15th day of September, 1981 and found guilty as to both counts. The jury imposed the death penalty after a finding of the aggravating circumstances that the murder was outrageously and wantonly vile, horrible and inhumane in that the murder involved torture, depravity of mind and aggravated battery to the victim (T.383-384,R.145). The Trial Judge sentenced the Appellant to life for armed robbery by order dated September 15, 1981 (R.146) and sentenced him to

death for murder by order dated September 16, 1981 (R.143-144).

Mr. Daniel Lee Turner was found lying unconscious in his place of business on the morning of June 8, 1981, suffering from numerous stab wounds and blunt traumas to his head (T.197,242). The Appellant was not questioned at the time of his arrest, but was transported to the Clarke County Jail where he was interviewed the following day by Sheriff Gene Smith and a deputy (T.223). The Appellant gave a statement which was reduced to writing and signed by him (T.231,Exhibit No. 7). The Appellant in his statement admitted the assault and robbery.

Two witnesses testified as to Appellant's presence at the scene of the crime. John Collins stated that he saw the Appellant leave the victim's store moments before the victim was found (T.158). He observed that the Appellant did not have a shirt on (T.159). Mr. Willie D. Robertson who had known Appellant all his life went to the store that morning and saw the Appellant in the doorway. Mr. Robertson testified that the Appellant stated words to the effect that, "Damn, I have killed Mr. Dan" and told the witness not to say anything about it (T.165). The witness observed a hammer in Appellant's hand (T.166) and he appeared nervous (T.167). The witness reported the incident directly to the Sheriff's office (T.168). The Appellant left on foot (T.158).

The victim's wallet (T.191), a knife blade (T.200), a hammer, and Appellant's shirt were recovered the same day (T.236-237).

Dr. Dawson of the Georgia Crime Laboratory who performed an autopsy on the victim testified as to his findings. His examination revealed sixteen stab wounds to the body, three of which penetrated into the plural cavity, and two or three distinct blows to the head, causing intercranial hemorrhage. He was of the opinion that Mr. Turner died as a result of a subdural hematoma secondary to blunt force trauma to his head (T.242-246) and that all the wounds were inflicted while the victim was alive (T.247). Mr. Turner died later that evening (T.269).

When the Appellant was arrested on the evening of the incident, he was cooperative and offered no resistance (T.188).

The Appellant's former teacher and assistant principal, Mr. Merrill Gay, testified for the defense. The Appellant was placed in special educational classes, Educable Mentally Retarded, until he dropped out of school at the end of his eighth year. The determining factor used by the school system is an individual's I.Q. score (T.273).

Dr. Everett Clark Kuglar, Superintendent of Georgia Regional Hospital at Augusta, examined and tested the Appellant as to his mental condition. The test was administered in two sections to determine his mental level. He scored a 71 I.Q. as to his verbal skills and a 61 I.Q. as to performance skills for a full-scale score of 65, which the doctor explained as

mildly retarded (T.280). He stated that this individual would test somewhere between ten and eleven as a mental age (T.281). On cross-examination the doctor was of the opinion that the Appellant was able to determine right from wrong at the time of his evaluation (T.283).

The Appellant took the witness stand to testify in his own defense after having been advised of his constitutional right not to do so. He stated that he first went to an aunt's house and then to the home of a friend that morning (T.285). He was walking and decided to go to Mr. Turner's store for some cigarettes (T.286). When Mr. Turner turned for the cigarettes, the Appellant reached for him. "You know, when he retched at the cigarettes, I retched at him, you know, just... Then he, you know, had the hammer and, when he grabbed that hammer, you know, he started forcing his self, you know, and I got carried away" [quote] (T.287). He admitted the stabbing and hitting him with the hammer after Mr. Turner dropped it (T.287). He went back in the store after confronting Mr. Robertson [a witness] and took money from the person of Mr. Turner and the cash register and started running (T.288). He denied that he had any intentions of robbing (T.289) and did not intend to kill Mr. Turner and later cried (T.290).

The jury found William Alvin Smith guilty as to both counts on September 15, 1981 (R.142).

In the penalty phase of the trial family members and a friend testified as to his unusual behavior shortly before the incident.

His mother testified that he appeared strange and acted bizarre a day or two before the incident (T.351). His aunt and girlfriend both testified that he was talking strange and was not himself (T.358,359).

The jury, after the charge by the Court, found the written aggravating circumstances supplied to them and returned the death penalty.

Additional facts and references to the transcript will be supplied in Part III of this brief whenever necessary to adequately address any issue raised in this Appeal.

IN THE SUPREME COURT

OF THE STATE OF GEORGIA

WILLIAM ALVIN SMITH,	)	
	)	
Appellant	)	CASE NO. 38247
	)	
-v-	)	
	)	
STATE OF GEORGIA,	)	
	)	
Appellee	)	

ENUMERATION OF ERRORS

PART II

Now comes William Alvin Smith, defendant in the Lower Court, and files this his Enumeration of Errors as follows:

-1-

The Court erred in admitting certain photographs into evidence over objection (T.396, 397, Exhibits 8 and 9).

-2-

The Court erred in failing to define the term of mitigating circumstances.

-3-

The Court erred in failing to specify the mitigating circumstances offered by the Appellant and also providing same in written form for the jury to consider during their deliberation in the penalty phase of the trial.

-4-

The sentence was imposed under the influence of passion,

prejudice, and other arbitrary factors.

-5-

The Court erred by instructing the jury to disregard Appellant's mother's emotional plea for her son's life during the penalty phase of the trial (T.356).

-6-

The Court erred in failing to declare and squash the Georgia Death Statute providing for the imposition of the death penalty (R.138).

-7-

The Court erred in failing to declare the Georgia Unified Appeal unconstitutional (R.138).

The Supreme Court of the State of Georgia has jurisdiction as to this Appeal by reason of the fact that the Appellant herein was convicted of murder and sentenced to death by a jury. This is one of those cases specifically enumerated in Ga. Code Ann. §2-3704 as being within the exclusive jurisdiction of the Supreme Court of Georgia.

PART III

ARGUMENT AND CITATION OF AUTHORITY

ENUMERATION NO. 1. THE COURT ERRED IN ADMITTING CERTAIN PHOTOGRAPHS INTO EVIDENCE OVER OBJECTION.

Appellant recognizes Georgia's liberal policy toward the admission of photographic evidence and should be admitted if relevant, unless it is unnecessarily prejudicial to the Appellant and results in a violation of due process.

Exhibits 8 and 9 consisted of photographs taken of the victim at the hospital after surgery and are produced on pages 396 and 397 of the Transcript. These photographs vividly show large amounts of blood and the body in a contorted position were introduced solely for the purpose of inflaming the minds of the jurors against the Appellant. See Florence v. State, 243 Ga. 738, 741(4), (n.1) 256 S.E. 2d 467 (1979).

Dr. Dawson stated that he had an opinion as to the cause of death and described the physical trauma in detail given to the body (T.242-246). The photographs would merely be cumulative to the testimony of other witnesses. These photographs of the victim are spectacularly gruesome and do not indicate the cause of death. They only depicted massive hemorrhaging about the head and stab wounds to the body.

Defendant shows that the outrageous and horrible portrayal of the victim in the photographs did so inflame and

prejudice the minds of the jurors against the Appellant that he was denied an impartial and fair trial and the due process of law.

Appellant would further submit that the cause of death is not a question for laymen in this case, but rather a matter for a trained medical doctor, and yet by allowing these photographs to be introduced into evidence, the jury was given the opportunity to make a decision as to a point in which they had no training, special knowledge, or expertise.

ENUMERATION NO. 2. THE COURT ERRED IN FAILING TO DEFINE THE TERM OF MITIGATING CIRCUMSTANCES.

In the penalty phase of the trial the court instructed the jury as to aggravating circumstances, in that the offense of murder was outrageously or wantonly vile, horrible, or inhumane, in that it involved torture, depravity of mind, or an aggravated battery to the victim.

Further in the charge the Court instructed the jury that mitigating circumstances are those circumstances which in fairness and mercy shall be considered in fixing the punishment. However, the Court failed to instruct the jury as to the definition of mitigation. The Appellant contends that the undue emphasis in the charge as to aggravating circumstance and the limited and naked charge as to mitigating circumstances denied the Appellant a fair trial and due process of law.

ENUMERATION NO. 3. THE COURT ERRED IN FAILING TO SPECIFY THE

MITIGATING CIRCUMSTANCES OFFERED BY THE APPELLANT AND ALSO PROVIDING SAME IN WRITTEN FORM FOR THE JURY TO CONSIDER DURING THEIR DELIBERATION IN THE PENALTY PHASE OF THE TRIAL.

The Court erred in failing to specify to the jury the specific mitigating circumstances that the Appellant contends exist in this case. By failing to so charge the jury undue emphasis was given to the specific aggravating circumstances contended and asserted by the State.

The Court provided to the jury, as provided by statute, with a written instruction as to the aggravating circumstance asserted by the State. The Court did not provide the jury with a written form as to mitigating circumstances.

The law of this State prohibits an alleged confession of a Defendant to be taken into the jury room during the jurors deliberation. The reason given by the Courts for this rule is that such confessions would be given "to much weight".

The Appellant submits that the same affect occurs in the present situation where written instructions as to aggravating circumstances are allowed to be submitted to the jury during their deliberation and no written instruction as to mitigating circumstances is provided for the jury's consideration and deliberation. This violates the Appellant's right to a fair and impartial trial and due process of law.

ENUMERATION NO. 4. THE SENTENCE WAS IMPOSED UNDER THE INFLUENCE

OF PASSION, PREJUDICE, AND OTHER ARBITRARY FACTORS.

The jury was repulsed by the death of an eighty-two year old white man caused by a twenty-one year old black man and were impassioned by the gory and inflamatory photographs.

The sentence of death was imposed in this case when no convicted murder has died in the Georgia electric chair in approximately eightteen years. The jurors could have reasonably believed, and the Appellant submits that they did in fact believe, such a sentence would never be carried out. If they had known that this Appellant would in fact be executed they would not have voted for infliction of the death penalty.

ENUMERATION NO. 5. THE COURT ERRED BY INSTRUCTING THE JURY TO DISREGARD APPELLANT'S MOTHER'S EMOTIONAL PLEA FOR HER SON'S LIFE DURING THE PENALTY PHASE OF THE TRIAL (T.356).

The mother of the Appellant was called as a witness on his behalf during the penalty phase of the trial. During questioning by Appellant's attorney she made an emotional plea for her son's life. She begged for his life and started crying (T.355). The Trial Judge instructed the jury to disregard the emotional outbreak (T.356). The credibility and demeanor of all witnesses is by law the exclusive judgment of the jury. Appellant submits that this is an impermissible comment by the Trial Judge and denied Appellant a fair hearing in the penalty phase of his trial. The State and the U. S.

Supreme Court distinguish a higher procedural safeguard when applied to death penalty cases.

ENUMERATION NO. 6. THE COURT ERRED IN FAILING TO DECLARE AND SQUASH THE GEORGIA DEATH STATUTE PROVIDING FOR THE IMPOSITION OF THE DEATH PENALTY.

Georgia Laws 1973, pp. 159, 163 (Ga. Code Section 27-2534.1) is discretionary and is applied discriminatorily against certain classes of defendants in violation of due process and equal protection clauses of Art. I, Sec. I, Pars. II and III of the Georgia Constitution (Ga. Code Sections 1-102, 2-103) and the Fourteenth Amendment to the United States Constitution.

The application of Georgia Laws 1973, pp. 159, 163 (Ga. Code Section 27-2534.1) has been unreasonable, arbitrary, and capricious because of the lack of definition and direction of application of "mitigating circumstances" resulting in the arbitrary application of the death penalty, in violation of the equal protection clause of Article I, Section I, Paragraph II of the Georgia Constitution (Ga. Code Section 2-102) and the Fourteenth Amendment to the United States Constitution.

The categories of aggravating circumstances in Georgia Laws 1973, pp. 159, 163 (Ga. Code Section 27-2534.1) are unreasonable and arbitrary in violation of the equal protection clause of Art. I, Sec. I, Par. II of the Georgia Constitution (Ga. Code Section 2-102) and of the Fourteenth Amendment to the United

States Constitution.

Georgia Laws 1974, pp. 352, 353 (Ga. Code Section 27-2302) allows the jury subjective discretion in applying the death penalty in violation of Furman v. Georgia, supra, and of the Eighth and Fourteenth Amendment to the United States Constitution.

Georgia Laws 1973, pp. 159, 165 (Ga. Code Section 27-2537(f)), provides for the collection of data on sentences imposed in capital felony cases after January 1, 1979, for purposes of reviewing death sentences as excessive or disproportionate or arbitrary. This statutory check against arbitrary and discriminatory application of the death penalty is not being complied with, hereby depriving defendants sentenced to death of an effective or adequate review of their sentence in violation of due process of law.

The death penalty in the above stated case is arbitrary because:

1. The death penalty is in fact administered and applied arbitrarily, capriciously, and whimsically in the State of Georgia; and if sentenced to death William Alvin Smith will be executed, pursuant to a pattern and practice of wholly arbitrary and capricious infliction of that penalty in violation of his rights guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution.

2. The Supreme Court of the United States upheld the Georgia capital punishment statutes "[on] their face" only upon the assumption that the procedures mandated by the statutes would assure that sentences of death are not wantonly or freakishly imposed. Gregg v. Georgia, 428 U.S. 153, 198 (1976). As those statutes have been applied, however, death sentences in Georgia have in fact been imposed in an arbitrary and capricious manner.

ENUMERATION NO. 7. THE COURT ERRED IN FAILING TO DECLARE THE GEORGIA UNIFIED APPEAL UNCONSTITUTIONAL.

William Alvin Smith is denied his rights to effective assistance of counsel. When he is required to divulge to the Court information that he should be able to share solely with his attorney it intervenes in the privacy of the attorney-client privilege. In addition, the Unified Appeal interferes with the attorney-client trust relationship as the Court is constantly questioning the judgment of the accused's counsel.

Appellant is denied his right to be free from self-incrimination. When the Court asks questions he is forced to divulge information which he should reveal only to his attorney.

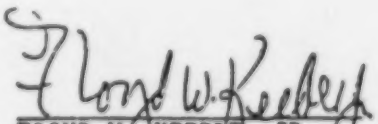
Appellant is deprived of his right to due process of law when he is asked to make decisions about the skills of his attorney and whether he wishes to raise any legal issues. This is a matter which is solely within knowledge of an attorney.

The attorney for Appellant is not competent to assess multitude of rights and procedures listed in the Unified Appeal given the limited resources available to an indigent in a death penalty case. The attorney for an indigent cannot conduct the preparation and investigation necessary to make intelligent and sensitive judgments with respect to his client's constitutional rights. These provisions of the Ga. Code both facially and as applied violate Appellant's privilege against self-incrimination, rights to a fair trial, effective assistance of counsel, and due process of law as guaranteed by the Georgia Constitution and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Appellant therefore requests this Court to overturn his conviction for murder and the sentence of death imposed on him for the reasons given above.

Respectfully submitted,



FLOYD W. KEEBLE, JR.
Attorney for Appellant

315 Bond Street
Royston, Georgia 30662
Phone: 404/245-5088

STATE OF GEORGIA,

COUNTY OF OGLETHORPE.

CERTIFICATE OF SERVICE

I, Floyd W. Keeble, Jr., attorney for William Alvin Smith, the Appellant, do hereby certify that I have this date served the HONORABLE J. CLEVE MILLER, District Attorney of the Oglethorpe County Superior Court, P. O. Box 247, Elberton, Georgia 30635; the HONORABLE LINDSEY A. TISE, JR., Assistant District Attorney of Oglethorpe County Superior Court, P. O. Box 633, Hartwell, Georgia 30643; and the HONORABLE MICHAEL J. BOWERS, Attorney General of the State of Georgia, Room 132, Judicial Building, Atlanta, Georgia 30334, with a copy of the within and foregoing Brief on Behalf of Appellant by placing same in the United States Mail, postage prepaid, being their last known addresses.

This the 2 day of January, 1982.

Floyd W. Keeble Jr

FLOYD W. KEEBLE, JR.
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APPENDIX B

(175 SE2d 657) (1970).

38358. IN THE INTEREST OF R. A. S.

WELTNER, Justice.

On May 1, 1981 the Georgia Department of Human Resources (the Department), acting by and through the DeKalb County Department of Family and Children Services, filed a petition to terminate the parental rights of appellee, the mother of R. A. S., in the Juvenile Court of DeKalb County, Georgia, the county in which the child was present at the time the action began. Appellee moved to dismiss the petition for want of venue, contending that she was a resident of Gwinnett County. Citing the decision of this court in *Quire v. Clayton County Dept. of Family & Children Servs.*, 242 Ga. 85 (249 SE2d 538) (1978), the Juvenile Court of DeKalb County dismissed the petition, stating that venue was in Gwinnett County.

The Department urges venue in DeKalb County under the provisions of Code Ann. § 24A-1101: "A proceeding under this Code [Title 24A] may be commenced in the county in which the child resides. If delinquent or unruly conduct is alleged, the proceeding may be commenced in the county in which the acts constituting the alleged delinquent or unruly conduct occurred. *If deprivation is alleged, the proceeding may be brought in the county in which the child is present when it is commenced*; . . ." (Emphasis supplied.)

In *Quire*, supra, we held that where the proceeding involves only the termination of parental rights, the parents have the constitutional right to defend such a suit in the county in which they reside, citing Ga. Const. 1976, Art. VI, Sec. XIV, Par. VI (Code Ann. § 2-4306).[1] Observing that the jurisdiction of the juvenile courts includes cases criminal in nature and cases civil in nature, we concluded: "We do not find that the termination of parental rights falls in the quasi-criminal area. For those that do, delinquency, unruliness and juvenile traffic offenses, the venue provisions of the juvenile code and the State Constitution, that venue lies in the county in which the act was committed, are in accord. . . . Having concluded that delinquency, unruliness and traffic offender proceedings are quasi-criminal in nature and that the other proceedings under the juvenile court's jurisdiction are not, the criminal venue provisions cannot justify bringing this termination of parental rights action in Clayton County when the parents are Fulton County residents." 242 Ga. at 87.

[1] "All other civil cases shall be tried in the county where the defendant resides, and all criminal cases shall be tried in the county where the crime was committed, except cases in the Superior Courts where the Judge is satisfied that an impartial jury cannot be obtained in such county."

Subsequent to our decision in *Quire*, the Georgia General Assembly adopted a proposed constitutional amendment which rewrote Art. VI, Sec. XIV, Par. VI as follows: "All other civil cases, except juvenile court cases as may otherwise be provided by the Juvenile Court Code of Georgia, shall be tried in the county where the defendant resides, and all criminal cases shall be tried in the county where the crime was committed, except cases in the Superior Courts where the Judge is satisfied that an impartial jury cannot be obtained in such county." Ga. L. 1980, p. 2174. The amendment was ratified by the people and became effective on January 1, 1981. Ga. Const. 1976, Art. XII, Sec. I, Par. IV (Code Ann. § 2-6904). The Department contends that this provision removed any constitutional impediment to the application of Code Ann. § 24A-1101 to termination proceedings, and that the juvenile court erred in dismissing the petition filed in DeKalb County.

It is well settled law in this State that "[t]he time with reference to which the constitutionality of an act of the General Assembly is to be determined is the date of its passage, and if it is unconstitutional then, it is forever void." *Jones v. McCaskill*, 112 Ga. 453, 456 (37 SE 724) (1900). " 'An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.' " *Herrington v. State*, 103 Ga. 318, 320 (29 SE 931) (1898), quoting Norton v. Shelby County, 118 U. S. 425, 442 (6 SC 1121, 30 LE 178) (1886). It follows that once a statute is declared unconstitutional and void, it cannot be saved by a subsequent statutory amendment, as there is, in legal contemplation, nothing to amend. *City of Atlanta v. Gower*, 216 Ga. 368 (116 SE2d 738) (1960). Nor can a void statute be revived by a subsequent constitutional amendment. *Jamison v. City of Atlanta*, 225 Ga. 51 (165 SE2d 617) (1969). Similarly, where a statute is held to be unconstitutional and void in part, a subsequent constitutional amendment cannot revive the void portion. *Commrs. of Rds. & Revenues v. Davis*, 213 Ga. 792 (102 SE2d 180) (1958). For an illuminating treatment of this area of our law see Sentell, *Unconstitutionality in Georgia: Problems of Nothing*, 8 Ga. L. Rev. 101 (1973).

While reaffirming these principles, we conclude that the case before us today is distinguishable. In *Quire*, supra, we did not hold Code Ann. § 24A-1101 to be unconstitutional in whole or in part. We

and the wallet, hammer, shirt, and $237.00 were recovered. Smith confessed to the crime and stated: "The reason for my actions, I was trying to get money for another car."

Shortly after the crime, a local veterinarian discovered Turner in his store under a large empty aluminum trash barrel, and several large cardboard boxes and other pieces of trash. Across the top of his head was a deep gash. He was lying unconscious in a pool of blood. His glasses had been knocked crooked; his false teeth plate was across his mouth. A broken knife blade was found in the fold of his shirt. Turner had been stabbed once below the corner of the right eye, four times in the upper right side of the chest, and twelve times in the back. He also had been struck in the head with a blunt instrument and a medical expert testified that these wounds could have resulted from the blows of a hammer. The 82-year-old victim died the next day from blunt force trauma to his head.

The sentence of death in this case rests upon the aggravating circumstances set forth in Code Ann. § 27-2534.1 (b) (7): "The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." We review the sentence in light of the United States Supreme Court's decision in Godfrey v. Georgia, 446 U. S. 420 (100 SC 1759, 64 LE2d 398) (1980), as construed by this court in *Hance v. State*, 245 Ga. 856, 861 (268 SE2d 339) (1980), as follows: "Torture occurs when the victim is subjected to serious physical abuse before death." The victim in this case was not killed instantaneously, but was stabbed a total of 17 times and then beaten about the head with a hammer. The victim lived almost a full day after the crime.

A defendant who tortures his victim may be found to have a depraved mind; and the age and physical characteristics of the victim may be considered in determining depravity of mind. *Hance v. State*, supra at 862.

This was not a "domestic" murder. The victim gave Smith no reason to assault him, and was in no manner threatening. Rather, Smith had known the victim for as long as he could remember, and the victim had been "good to him." Smith fled and attempted to hide his crime. See Godfrey v. Georgia, supra. The sole motive for the murder was the armed robbery of the victim to obtain money to purchase another car.

The evidence substantiates and supports the findings of the statutory aggravating circumstances, and the sentence of death. Under the facts of this case, we find that the murder was the type universally condemned by civilized society as wantonly vile, horrible, and inhumane as it involved torture to the victim as set forth above.

8. We have reviewed the instruction of the trial court during the sentencing phase of the trial and find that the charge was not subject to the defects dealt with in *Fleming v. State*, 240 Ga. 142 (240 SE2d 37) (1977), and *Hawes v. State*, 240 Ga. 327 (240 SE2d 833) (1977). In reviewing the death penalty, we have considered the cases appealed to this court since January 1, 1970 in which a death or life sentence was imposed and have listed in the appendix twenty-three similar cases imposing the death penalty.

This was a cold-blooded killing of an elderly man, committed in the course of an armed robbery, with the sole motive being financial gain. The cases in the appendix involve the unprovoked killing of an unarmed victim or victims during an armed robbery, and, therefore, illustrate a jury's willingness to impose a death sentence under these circumstances. Smith's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Judgment affirmed. All the Justices concur.

DECIDED APRIL 6, 1982.

Murder, etc. Oglethorpe Superior Court. Before Judge Grant.

Floyd W. Keeble, Jr., for appellant.

J. Cleve Miller, District Attorney, Lindsay A. Tise, Jr., Assistant District Attorney, Michael J. Bowers, Attorney General, Virginia H. Jeffries, for appellee.

APPENDIX.

Cunningham v. State, 248 Ga. 558 (284 SE2d 390) (1981); *Cervi v. State*, 248 Ga. 325 (282 SE2d 629) (1981); *Justus v. State*, 247 Ga. 276 (276 SE2d 242) (1981); *Solomon v. State*, 247 Ga. 27 (277 SE2d 1) (1980); *Dick v. State*, 246 Ga. 697 (273 SE2d 124) (1980); *Dampier v. State*, 245 Ga. 427 (265 SE2d 565) (1980); *Tucker v. State*, 244 Ga. 721 (261 SE2d 635) (1979); *Gates v. State*, 244 Ga. 587 (261 SE2d 489) (1979); *Cobb v. State*, 244 Ga. 344 (260 SE2d 60) (1979); *Baker v. State*, 243 Ga. 710 (257 SE2d 192) (1979); *Ruffin v. State*, 243 Ga. 95 (252 SE2d 472) (1979); *Potts v. State*, 241 Ga. 67 (243 SE2d 510) (1978); *Moore v. State*, 240 Ga. 807 (243 SE2d 1) (1978); *Stanley v. State*, 240 Ga. 341 (241 SE2d 173) (1977); *Corn v. State*, 240 Ga. 130 (240 SE2d 694) (1977); *Pulliam v. State*, 236 Ga. 460 (224 SE2d 8) (1976); *Dobbs v. State*, 236 Ga. 427 (224 SE2d 3) (1976); *Mitchell v. State*, 234 Ga. 160 (214 SE2d 900) (1975); *Floyd v. State*, 233 Ga. 280 (210 SE2d 810) (1974); *Gregg v. State*, 233 Ga. 117 (210 SE2d 659) (1974); *Hunter v. State*, 231 Ga. 494 (202 SE2d 441) (1973); *Kramer v. State*, 230 Ga. 855 (199 SE2d 805) (1973); *Lingo v. State*, 226 Ga. 496

There being no evidence, and no suggestion by counsel, of an inability to distinguish between right and wrong or of acts which were the consequence of an insane delusion, any want of precision in the charge relative to these two principles is at most harmless error. *Lively v. State*, 178 Ga. 693 (12) (173 SE 836) (1934); *Reece v. State*, 212 Ga. 609 (94 SE2d 723) (1956); *Woods v. State*, 214 Ga. 546 (105 SE2d 896) (1958).

We note, also, that the court submitted to the jury a prepared verdict in the form as follows:

"VERDICT

COUNT I: 'We, the jury, find the defendant (guilty-not guilty) of murder.'

COUNT II: 'We, the jury, find the defendant (guilty-not guilty) of armed robbery.' "

After the charge, defense counsel remarked that the form did not contain a place for a finding of not guilty by reason of insanity. There was, however, no objection. The court inquired of the defense counsel "Do you think that's all right?" He responded, "Yes, sir."

The failure of the court to submit a form including all of the possible forms of the verdict was not harmful, in view of our holding as to the issue of insanity in this case.

If prepared forms for verdicts are to be submitted to juries, it is obviously preferable that the submission contain a form for each verdict which might be permissible in the case. Because court-submitted documents are still rare in our practice, particular attention should be given, lest the jury draw an inference, however unfounded, of pre-disposition on the part of the trial judge. Here, as an example, the form contains in parentheses the words "guilty-not guilty." While there is no such evidence in this case, some other jury might perceive the antecedence of the word "guilty" over the words "not guilty" to be expressive of the view of the court. It would be safer were the words guilty and "not guilty" omitted entirely from the form, to be completed by the hand of the jury.

Sentence Review

As required by Ga. L. 1973, p. 159, et seq., (Code Ann. § 27-2537 (c) (1-3)), we have reviewed the death sentence in this case. We have considered the aggravating circumstances found by the jury, and the evidence concerning the crime and the defendant.

As provided for by the Unified Appeal procedure, we have reviewed independently the record and transcript and find no significant potential of error other than those enumerated by the

appellant.

6. Appellant argues that the sentence of death was imposed under the influence of passion, prejudice and other arbitrary factors, because the jury was inflamed by the death of an 82-year-old white man by a 21-year-old black man, together with gory photographs. We do not agree. Two photographs were not cumulative nor unnecessarily gruesome considering the scenes which they depicted. They are plainly admissible. Division 1, supra. The record is bare of any indication that the jury abdicated its oath for passion or prejudice. The appellant further asserts the "Private Slovik syndrome" for the first time on appeal. This argument is without merit. *House v. Stynchcombe*, 239 Ga. 222 (236 SE2d 353) (1977); *Cape v. State*, 246 Ga. 520 (272 SE2d 487) (1980). We find that the sentence of death was not imposed under the influence of passion prejudice or any other arbitrary factor.

7. The jury found the following statutory aggravating circumstances justifying the death sentence: "The repeated stabbings along with two blows in the head justifies aggravating circumstances. Also the fact he was first stabbed in the back. Also the fact that he received the blows to his head after he was lying on the floor suffering from the stab wounds. For the said offense of murder was outrageously and wantonly vile, horrible and inhumane, in that the murder involved torture, depravity of mind and aggravated battery to the victim."

The State presented evidence that on June 8, 1981, Smith walked to Turner's grocery store in Lexington, Georgia. Smith had known Turner, whom he referred to as "Mr. Dan," as long as he could remember, and Turner had always been good to him. When he arrived at the store, Turner was asleep but awoke to wait on him. He asked for a pack of cigarettes and observed that Turner was alone. When Turner reached around for the cigarettes, Smith grabbed him and Turner resisted. Smith pulled a knife out of his back pocket and repeatedly stabbed Turner until Turner dropped a hammer he had picked up. Smith grabbed the hammer and hit Turner with it twice in the head. At that time Smith saw that Willie Robinson had come to the door. The appellant went to the door and told Willie Robinson, "Damn, I have killed Mr. Dan." He instructed Willie Robinson not to tell anyone. Smith thereafter went back in the store from the front door and took money from the cash register and Turner's wallet. He was observed running from the store. While he was running, he wrapped his shirt around his bleeding hand and the hammer. As he ran, he threw the hammer and the shirt on the side of the road. Eventually he threw Turner's wallet away.

Smith was captured by authorities on the night of the murder

3. Smith's fifth enumeration of error asserts that the trial court erred in instructing the jury to disregard an emotional outcry by Smith's mother during the sentencing phase of the trial.

The transcript reflects the following events during examination of Smith's mother by his counsel:

"MRS. SMITH: I'm begging y'all. Please don't take him away from me. (Witness crying). Punish him, yes, but don't kill him.

"MR. KEEBLE: Miss Mary, please compose yourself. All right? Just answer [the District Attorney's] questions."

The District Attorney then cross-examined Mrs. Smith, asking but seven questions, whereupon the witness was dismissed, and another witness was called on behalf of Smith. It was at *this* point that the court stated to the jury: "Ladies and gentlemen of the jury, I believe this is a serious matter, but I will ask you to please disregard the emotional outbreak. It has no part in this trial. We're here to decide this matter — you are — from the evidence and the law, and you decide it from that."

No objection was made to this instruction and we cannot say that the trial court abused its discretion in so instructing the jury. *Messer v. State*, 247 Ga. 316, 324 (6) (276 SE2d 15) (1981), and cases cited. It is apparent that the trial judge's ruling was not an impermissible comment on the evidence. See *High v. State*, 247 Ga. 289 (276 SE2d 5) (1981).

4. In his sixth and seventh enumerations, Smith contends that both the death penalty statute and the Georgia Unified Appeal procedures are unconstitutional, both as constituted, and as applied in this case. "This court and the Supreme Court of the United States have upheld the constitutionality of the Georgia death penalty statute in a number of cases, and the appellant has advanced no new reason for us to reconsider our position. Gregg v. Georgia, 428 U. S. 153 (96 SC 2909, 49 LE2d 859) (1976); *Legare v. State*, 243 Ga. 744 (257 SE2d 247) (1979)." *Stevens v. State*, supra at 707.

Smith avers that the statutes have been applied in fact in an arbitrary and capricious manner. He points to no facts which support this conclusion. The same attack has been raised before and decided adversely to Smith's position. McCorquodale v. Balkcom, 525 FSupp. 408, 525 FSupp. 431 (N. D. Ga. 1981).

This court has also upheld the constitutionality of the Unified Appeal procedure in *Sliger v. State*, 248 Ga. 316 (282 SE2d 291) (1981), cert. denied, —— U. S. —— (decided February 22, 1982). Certainly, to determine at a state in the proceeding when a remedy might be provided whether a client is satisfied with his attorney's handling of his case is not invading the attorney-client relationship, as urged upon us by Smith. Neither does that determination call into question the "judgment of the accused's counsel." Similar procedures are used to determine competency of counsel when guilty pleas are tendered. *Fair v. State*, 245 Ga. 868, supra; and, it cannot seriously be argued that these procedures, which are designed to protect the rights of a defendant, violate the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

5. We have studied the entire record of this case, and turn now to two matters which are not addressed in the enumeration of errors.

The trial court charged on insanity as follows: "Thus, if you find the defendant did not have reasonable sufficiency to distinguish between right and wrong because of mental disease, injury or congenital deficiency, *and* [emphasis supplied] that he acted ... he did because of delusional compulsion, as I have instructed you, at the time the commission of such alleged offense, that would be an end of your consideration of this case and you would stop at that point and enter a verdict that would reflect your findings. And the form of that verdict would be, 'We, the jury, find the defendant not guilty by reason of insanity.' "

It is possible that the use of the conjunction "and" might be understood by the jury to imply that a verdict of not guilty by reason of insanity would require both an inability to distinguish right and wrong and delusional compulsion.

We have reviewed the record in this case relative to any evidence of insanity which could support a finding of not guilty by reason of insanity. The most the evidence shows is that Smith had a low IQ, possibly equivalent to that of an eleven-year-old child. There is a vast difference between low intelligence and an inability to distinguish between right and wrong. Indeed, the psychiatric testimony in the case indicates that 10% of the adult population has an intelligence level not greater than Smith's.

In final argument, Smith's counsel addressed the question of insanity as follows: "And [the judge] will charge you, I would expect, that you are to consider in your deliberations, taking your experience into that jury room, that you are to consider the absolute senselessness of the act. I will say to you the absolutely bizarre, totally senseless taking of Mr. Dan's life. You can consider that, ladies and gentlemen, in your deliberation. And, in that event, you would be authorized, if you so found, that because of the very nature of the act and the other evidence that has been presented to you, and I submit to you his IQ level, that he was insane at the time he did it. He just went berserk. No planning was involved in this thing. Certainly there's no logic to it, any way you can look at it. So I submit to you, ladies and gentlemen, that we're talking about a ten or eleven year-old child. ...."

have changed over the years, by statute and interpretation, and will doubtless continue to change in the future. "We would remark, in conclusion, that evidence must accommodate itself, and it is constantly doing so, to the state of society and the concerns of the world around us." Lumpkin, C. J., in *Hart v. Powell*, supra, at 642.

Therefore, a trial judge's determination that evidence offered as part of the *res gestae* is sufficiently informative and reliable as to warrant being considered by the jury will not be disturbed on appeal unless that determination is clearly erroneous.

As to other enumerations of error, the evidence was sufficient to enable a rational trier of fact to find the guilt of the accused beyond a reasonable doubt; the trial court did not err in admitting statements of the accused after a Jackson-Denno hearing; and there was no error in admitting scientific evidence concerning blood-alcohol content, nor in the charge of the court. Andrews' attack upon the composition of the grand and trial jury lists, coming as it did after conviction, is not timely. *Young v. State*, 232 Ga. 285 (206 SE2d 439) (1974). All other enumerations of error are without merit.

Judgment affirmed. All the Justices concur, except Gregory, J., who concurs in the judgment only.

DECIDED APRIL 6, 1982.

Murder. Putnam Superior Court. Before Judge Duke.

Donald W. Huskins, for appellant.

Joe Briley, District Attorney, Michael J. Bowers, Attorney General, W. Davis Hewitt, Assistant Attorney General, for appellee.

38247. SMITH v. THE STATE.

WELTNER, Justice.

The defendant was convicted of armed robbery and murder of 82-year-old Daniel Turner. The jury returned a finding that the murder was outrageously and wantonly vile, horrible and inhuman in that the murder involved torture, depravity of mind and aggravated battery to the victim, and recommended that the defendant be sentenced to death. The trial court then sentenced the defendant to death for murder, and life imprisonment for the armed robbery.

1. In his first enumeration of error Smith contends that the trial court erred in admitting in evidence two black-and-white photographs of the victim. The two photographs showing the numerous stab wounds and head injuries received by the victim, one

frontal and one rear view, cannot be said to be repetitious or cumulative. The state complied with our suggestion in *Florence v. State*, 243 Ga. 738, 741 (fn. 1) (256 SE2d 467) (1979). The photographs were relevant in that they depicted the location and nature of the wounds received by the victim and corroborated the confession of the defendant. *Davis v. State*, 242 Ga. 901 (252 SE2d 443) (1979); *Brooks v. State*, 244 Ga. 574 (261 SE2d 379) (1979); *Cobb v. State*, 244 Ga. 344 (260 SE2d 60) (1979); *Franklin v. State*, 245 Ga. 141 (263 SE2d 666) (1980); *Fair v. State*, 245 Ga. 868 (268 SE2d 316) (1980); *Dick v. State*, 246 Ga. 697 (273 SE2d 124) (1980). We find no merit in this enumeration of error.

Smith further complains that by admitting the photographs, the jury was given the opportunity to make a decision as to the [illegible] death. The defendant overlooks the fact that this is the ultimate [illegible] facing the jury in any murder trial — death at the hand of the defendant.

2. In his second and third enumerations of error, Smith contends that the trial court erred in not defining the term "mitigating" and in not specifying the mitigating circumstances offered by him.

In *Potts v. State*, 241 Ga. 67, 86 (16) (243 SE2d 510) (1978), this court held: "Under Georgia law, mitigating circumstances are not required to be singled out in the charge. *Thomas v. State*, 240 Ga. 393, 401 (242 SE2d 1) (1977)"; and in *Collier v. State*, 244 Ga. 553, 568-9 (12) (261 SE2d 364) (1979), the court held: "The trial court charged that the jury was to 'consider all the evidence submitted in both phases of the trial in arriving at your verdict, including any and all evidence of mitigating circumstances.' It is not required that specific mitigating circumstances be singled out by the court in giving its instructions to the jury. [Citations omitted.] To influence the jury by use of examples may limit their discretion to consider other matters in addition to the examples given. A charge such as the one requested may influence the jury either to weigh mitigation against aggravation or to limit their consideration to whether mitigating circumstances exist. Under our statute the jury may recommend a life sentence even though no mitigating circumstances are found." Accord, *Stevens v. State*, 247 Ga. 698 (18) (278 SE2d 398) (1981).

The charge concerning mitigation was not improper, nor was it subject to the deficiencies discussed in Spivey v. Zant, 661 F2d 464 (5th Cir. 1981). The triers of fact were not limited in what they might consider in mitigation. Eddings v. Oklahoma, —— U. S. —— (102 SC 869, 71 LE2d 1) (1982). Mitigation being a word of common meaning and understanding, it is not error to fail to define it. *Cape v. State*, 246 Ga. 520 (272 SE2d 487) (1980).

APPENDIX C

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

WILLIAM ALVIN SMITH, Petitioner, v. ROBERT O. FRANCIS, Warden Georgia Diagnostic and Classification Center, Respondent.	]	Habeas Corpus Case No. 5804

PETITIONER'S MEMORANDUM OF LAW

IN SUPPORT OF PETITION FOR A WRIT OF HABEAS CORPUS

Stephen B. Bright
600 Healey Building
57 Forsyth Street, N.W.
Atlanta, Georgia 30303

Stephen H. Glickman
ZUCKERMAN, SPAEDER, MOORE,
TAYLOR & KOLKER
1201 Connecticut Avenue, N.W.
Washington, D.C. 20036

Counsel for Petitioner

L. Infliction of the Death Penalty on Petitioner Constitutes Cruel and Unusual Punishment.

The infliction of the death penalty on a retarded human being such as petitioner takes this case out of the mine run of capital cases. It forces this Court to confront whether the Constitution tolerates imposing the most merciless and irrevocable of punishments on that well-recognized class of people who, from inherent mental defect and not any moral fault, are least able to understand and obey society's strictures. Specifically, the question is whether the cruel and unusual punishment clause of the Eighth Amendment forbids the execution of mentally retarded persons such as petitioner.

The Supreme Court most recently held a death sentence cruel and unusual in Enmund v. Florida, ____ U.S. ____, 102 S.Ct. 3368, 73 L.Ed 2d 1140 (1982). There the Court held that the death penalty could not constitutionally be imposed on one who aided and abetted a robbery during which murder was committed by others but did not himself kill or intend to kill. Enmund's analysis of the cruel and unusual punishment clause in those circumstances establishes the controlling principles here.

To begin with, the issue is not whether death is a disproportionate penalty for murder, but rather whether it is a valid penalty for the particular offender. Enmund v. Florida, 102 S.Ct. at 3377, 73 L.Ed 2d at 1152. "The focus must be on his culpability, ... for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' ... which means that we must

focus on 'relevant facets of the character and record of the individual offender.'" Id. (citations omitted; emphasis in the original).

Death is a disproportionate punishment for the particular offender in question if the legitimate purposes of capital punishment would not be substantially fostered by its infliction on persons like him. Two purposes of the death penalty have been accepted by the Supreme Court: retribution, and deterrence of capital crimes by prospective offenders. Gregg v. Georgia, 428 U.S. at 183. "Unless the death penalty when applied to those in [the defendant's] position measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." Enmund, 102 S.Ct. at 3377, 73 L.Ed.2d at 1152 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

The Court struck down the death penalty in Enmund's case because neither deterrence nor retribution would have been significantly furthered by its infliction. As we shall see, its mode of analysis is highly pertinent to petitioner's case. Regarding deterrence, the Court considered the effect on those similarly situated to Enmund, and declared itself "quite unconvinced" that the possibilty of capital punishment for vicarious felony murder would deter those who do not contemplate the killing. Id., 102 S.Ct. at 3377,

73 L.Ed 2d 1152-1153. The Court quoted with approval Justice Frankfurter's observation in Fisher v. United States, 328 U.S. 463, 484 (1946), that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation." Id.

The Court also dismissed the notion that retribution could justify the execution of Enmund. Retribution, the Court held, must be tailored to the defendant's "personal responsibility and moral guilt." Id., 102 S.Ct. at 3378, 73 L.Ed.2d at 1154. The defendant's mental state is critical to this assessment. Id. Absent the intention to kill, the defendant's culpability would not be so great that his execution would "measurably contribute to the retributive end of insuring that the criminal gets his just desserts." Id. The Court observed that it had "employed a similar approach in Godfrey v. Georgia, 446 U.S. 420, 433 (1980), reversing a death sentence based on the existence of an aggravating circumstance because the defendant's crime did not reflect 'a consciousness materially more "depraved" than that of any person guilty of murder.'" Id.

The application of the foregoing principles to petitioner's situation requires first that his relevant personal characteristics be identified and described. As in Enmund, the focus must be on petitioner's mental condition and its relation to his offense. Then it is necessary to weigh the efficacy of capital punishment for people like petitioner in achieving the goals of retribution and deterrence.

As has been said, petitioner's outstanding characteristic is his unquestioned mental retardation. At his trial, Dr. Everett Clark Kuglar, Superintendent of the Georgia Regional Hospital, testified that petitioner's full-scale I.Q. was 65, that he was mildly retarded, and that his abilities were roughly those of "a youngster in the 10 to 11 year age range." (Tr. at 280-281.) Mr. Merrill L. Gay, former assistant principal of petitioner's middle school, testified that petitioner had been placed in the educable mentally retarded class on the basis of his I.Q. score. (Tr. at 273.) Regrettably, however, the significance of this evidence of petitioner's mental handicap was never developed at his trial. In particular, the behavioral consequences of his impairment were scarcely addressed. Instead the jury may wrongly have been led to believe that petitioner was merely a slow learner. (Tr. at 275.) As discussed earlier in this memorandum, this failure to do more than barely scratch the surface was attributable to petitioner's trial counsel's lack of preparation. See supra, pp. 6-8.

The affidavits admitted in evidence at petitioner's habeas hearing begin to make up for the evidentiary void in the trial record. The affidavit of Dr. Brad Fisher, an experienced and respected clinical-correctional psychologist, provides a comprehensive picture of petitioner. Dr. Fisher's evaluation is based on his own interviewing and testing of petitioner, described in detail at pages 4-6 and 8-12 of his affidavit; his interviews with petitioner's parents and siblings; his review of the testimony at peti-

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The portrait of petitioner which emerges when all the evidence is considered is of a mentally impaired young man whose retardation has had profound behavioral consequences. Any notion that petition is merely a "slow learner" is just wrong.

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William was slow, and if you were around the family for a long time you would pick up on the fact that he was not like his brothers and sisters. He was not as active as they were and he was very limited in his ability to understand.... Even up until the time of his arrest, William acted more like a little child than a grown up or a young adult. (Affidavit of Furman Sims.)

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William was different from all of the other children in our family. He was slow. I think that perhaps someone might at first just think he was quiet, but William could not learn like the rest of us. I would spend a lot of time with him working on homework, but William just did not understand it. He was the slowest one in our home.... [We] had to look out for him and help him with school work because he was slow.... (Affidavit of Shirley Ann Smith, sister.)

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William had problems as a child, however, because he was severely limited in his ability to understand, to follow directions and to do things that most children can do. William was never able to learn to do things as soon as

his brothers and sisters, and, as they grew older, the other children were able to do things that William was never able to do.

When William was at home, after school or on weekends, I would ask him to help me clean the house. William would try and he could do things like sweep, but he could not do things like make the bed. When he got older, about age 16 or 17, my husband, who has been a meat cutter all of his adult life, tried to teach William how to cut meat and wrap it. William was never able to wrap a package of meat. The younger boys would come in and my husband would cut the meat, and show how to wrap it up and then label it so that you would know what cut of meat was inside the wrapping, but William, or "Noodle" as we all called him, was never even able to wrap the paper around the cuts the right way. Since he was never able to learn to wrap the meat, my husband never attempted to teach him how to cut it....

William was not smart enough to keep up with the other students in school. He was not able to read very well at all, he could not do arithmetic, and could not spell words. He could not say his ABC's, and I still do not know if he is able to say them all the way through. Although William was in the class for educable mentally retarded at school for a while, he was never given any special training to deal with his mental limitations and no preparation for dealing with life as an adult with his limitations. William was frustrated with school because he could not learn and because he was so much bigger than the other students in his class. Finally, when he got old enough, he just gave up on school and stopped going.

William was very quiet and a lot of people did not know how limited he was. But he could not do anything that was complicated or follow directions. He could not get a driver's license. William does not have the good judgment that some of his brothers and sisters have or that other people have. He had to be in special classes at school, because he was not able to keep up with the other students. William has always needed more attention and more guidance than other children I have had. (Affidavit of Mary Smith, mother.)

The other character traits reported in the affidavits indicate some behavioral consequences of petitioner's mental impairment. He is repeatedly described as being extraordinarily quiet and withdrawn, passive and docile, submissive to authority and happiest doing simple and repetitive tasks, however back-breaking. A noteworthy refrain in the affidavits is that he always kept his problems and worries bottled up inside himself. (See, e.g., affidavits of Denise Bolton, Marlene Cofer, Willie B. Henson, Mary Smith, Shirley Ann Smith, Willie David Smith and Sara Taylor.)

Dr. Fisher's clinical evaluation elaborates on the functional consequences of petitioner's mental defects. His conclusions, which are fully supported by the lay witness observations, are summarized in his affidavit as follows:

> The presence of this level of mental retardation indicates much more than just slow learning; it indicates impaired social judgment, impaired ability to understand or acknowledge the consequences of behavior, impaired ability to make rational judgments, increased dependency features, susceptibility to confusion and anxiety in stressful situations, tendency toward more impulsive behavior (this often based on the condition in which the retarded person has more frequent frustrations with the many situations that are confusing and complex to him or her, without the ability to appropriately vent that frustration) and some diminished capacity to distinguish between right and wrong. This latter category is different from an inability to distinguish between right and wrong that may be the case where the insanity issue is involved.)

(Fisher Affidavit, page 11; see also pages 8, 13-14, 16.)

Dr. Fisher's description of petitioner satisfies the statutory definition of a mentally retarded person as "a person having a significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior which originates in the developmental period." Off. Code of Ga. Ann. §37-4-1(r); see also §17-7-131, defining "mentally ill" in almost identical language.

Dr. Fisher also explains how the foregoing features of petitioner's personality contributed to the commission of the offense. It will be recalled that at his trial there was testimony that in the days immediately before the crime, petitioner appeared unusually despondent and agitated. (Tr. at 350-358.) No explanation for this mental state was offered, however. Dr. Fisher explains that petitioner had just suffered two especially traumatic blows to his self-esteem which were directly related to his impulsive outburst of violence:

> [T]he following features seem especially noteworthy in his description of situational components in the days surrounding the commission of the crime. First, it should be pointed out that one of the most important people in William's life at this time was his girlfriend. He described her as the first person near his own age who had really cared about him, and this had taken on extraordinary importance in his life. With this in mind, the fact that he had broken up with his girlfriend in the two days previous to the crime appears significant. His own description of this event included his feelings of total frustration and confusion over what to do about the breakup.

> A second factor revolves around the destruction of William's car the day before the crime. This automobile was his first material possession of consequence, and a major feature relating to his self-esteem and feelings of self-worth. It should be noted that at the time the car was destroyed he did not have a license, and the car was not paid for. This served to further heighten his level of frustration and resultant confusion because of his inability to deal with that frustration....
>
> If one was to rank the two most important things in William Smith's life, these would probably have been his girlfriend and his car. To have both of these taken away at the same time would have been traumatic for anyone; however, with his primary psychological dynamics including major limitations in his ability to deal with frustration, as well as easily formed frustration and confusion over typical life experiences not confusing to those not mentally retarded, these events take on special significance. For a person with William's level of retardation, it is important to have a simple, straightforward, and consistent foundation upon which to operate. In his case, the two critical ingredients of this somewhat shaky foundation had been removed, which brought into play the limitations connected with his retardation, much more than would have been the case for a person with normal intellectual functioning, frustration tolerance, and ability to not become confused by outside stimuli.

(Fisher Affidavit, pages 8-10.)

The characterization of petitioner's offense as just another murder with a crass pecuniary motive is thus altogether too simplistic. It is more fairly perceived as the tragi-

cally impulsive outburst of a normally docile, mentally handicapped young man in response to a level of inner turmoil, frustration and confusion which was beyond his ability to resolve and control.

Applying now the Supreme Court's analysis of the cruel and unusual punishment clause in Enmund, application of the death penalty to retardates like petitioner measurably serves neither deterrence nor retribution. As far as deterrence is concerned, retardates' behavioral disorders and intellectual deficiencies render them largely immune from the threat of punishment. As petitioner's case illustrates, their impulsivity and intellectual impairment virtually rule out the kind of fully contemplated and coolly calculated crime for which the threat of the death penalty can have a deterrent effect. Enmund, 102 S.Ct. at 3377-3378, 73 L.Ed 2d at 1152-1153.[27/] The retardate's diminished ability to project into the future and rationally contemplate the consequences of his acts further reduces the likelihood that he will appreciate and be restrained by the prospect of punishment, or that he will be influenced by variations in the degree of punishment. See Sternlicht and Deutsch, Personality Development and Social Behavior in the Mentally Retarded 80 (1972); Grigg, Criminal Behavior

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27/ See also Gregg v. Georgia, 428 U.S. at 185-186, distinguishing "murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect," from those who perpetrate "carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act."

of Mentally Retarded Adults, 52 Am. J. of Mental Defici 370, 371, 374 (1948).

Retribution is an even poorer justification for exe ting retardates such as petitioner, depending as it does on the degree of their personal culpability. Courts have long recognized in capital cases that the mentally retard are not to be held to normal standards of accountability. E.g., State v. Hall, 126 Neb. 295, 310, 125 N.W.2d 918, 927 (1964) (reducing death sentence to life imprisonment where defendant a moron with an I.Q. of 64); State v. Behler, 65 Idaho 464, 475-476, 146 P.2d 338, 343 (1944) (sentence of death reduced to life imprisonment because defendant "possesses a very low order of intelligence"); Commonwealth v. Green, 396 Pa. 137, 148, 151 A.2d 241, 247-248 (1959) (death penalty vacated in light of defendant's youth and dull normal intelligence); see also Woods v. State, 214 Ga. 546, 105 S.E.2d 896, 897 (1958) (jury instructed that weakmindedness, though no defense to the crime, may be grounds for recommendation of mercy). In virtually every state with a capital sentencing scheme, mental retardation is recognized in one way or another to be a mitigating factor in sentencing. The universal recognition that retardates are less culpable than normal people is reflected in Dr. Fisher's actual experience and research, see Fisher Affidavit at 13.

The complex of reasons why retardates are less responsible for their antisocial behavior than ordinary people is summarized in Dr. Fisher's affidavit. Persons

with petitioner's degree of mental handicap suffer as a consequence "impaired social judgment, impaired ability to understand or acknowledge the consequences of behavior, impaired ability to make rational judgments, increased dependency features, susceptibility to confusion and anxiety in stressful situations, tendency toward more impulsive behavior... and some diminished capacity to distinguish between right and wrong." Fisher Affidavit at 11. Dr. Fisher's description is strongly supported in the literature. On the retardate's special proneness to react immediately and violently to the urges of the moment, see, e.g., Bromberg, The Mold of Murder 202 (1961) (tendency of retardates to "react in a blinding flash of vengeance" against frustration and humiliation); Glueck, Mental Disorder and the Law 334-335 (1925) (retardate's defective control of instinctive behavior may lead to serious crimes of violence); Sternlicht and Deutsch, supra at 58 (failure of defense mechanisms of repression and inhibition impair retardates' ability to control aggressive and hostile impulses). As the last-named authors note,

> [The] retarded individual is especially prone to committing deviant acts because he will be subject to weak and ineffective functioning not only in the realm of conscience and values but in the realm of judgment and common sense as well. It is the latter deficit, in fact, which creates perhaps the more immediate and pervasive of the retardate's problems in the area of deviant and antisocial conduct.

Id., at 81. See also Tredgold and Soddy, Textbook of Mental Deficiency (10th ed. 1963) 252 (retardate may

evince an understanding of the "nature" of the act -- that it is forbidden -- without fully understanding its "quality").

In short, the infliction of the death penalty on mentally retarded offenders such as petitioner does not serve either of the two recognized purposes of capital punishment. It is therefore "nothing more than the purposeless and needless imposition of pain and suffering," Coker v. Georgia, 433 U.S. at 592, which the Eighth and Fourteenth Amendments forbid.

APPENDIX D

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

WILLAIM ALVIN SMITH, Petitioner, v. ROBERT O. FRANCIS, WARDEN GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, Respondent.	*	CIVIL ACTION NO. 5804 HABEAS CORPUS

POST-HEARING BRIEF ON BEHALF OF THE RESPONDENT

Pursuant to agreement of counsel at the conclusion of the hearing on the above-styled case on March 31, 1983, the Respondent hereby files this brief in opposition to the petition for a writ of habeas corpus.

I.

STATEMENT OF THE CASE

Petitioner, William Alvin Smith, was indicted in Oglethorpe County for the murder of Daniel Lee Turner. The Petitioner was tried by a jury on September 14, 1981, was found guilty, and was sentenced to death. The death penalty was imposed upon a finding of O.C.G.A. § 17-10-30(b)(7); Ga. Code Ann. § 27-2534.1(b)(7).

On direct appeal to the Supreme Court of Georgia, the Petitioner's conviction and sentence were affirmed. Smith v. State, 249 Ga. 228, 290 S.E.2d 43 (1982).

On October 4, 1982, the United States Supreme Court denied Petitioner's petition for a writ of certiorari, and on November 29, 1982, that Court denied Petitioner's petition for rehearing.

A petition for a writ of habeas corpus was filed in this Court, and a hearing was held on March 31, 1983.

K. THE APPLICATION OF THE SECTION (b)(7) AGGRAVATING CIRCUMSTANCE TO PETITIONER WAS NOT UNCONSTITUTIONAL.

The Petitioner next alleges that as in Godfrey v. Georgia, supra, the Petitioner's jury was inadequately instructed on the aggravating circumstance at issue and alleges that the evidence failed to support the aggravating circumstance. On direct appeal, the Georgia Supreme Court reviewed this issue, and held that the murder was wantonly vile, horrible, and inhuman as it involved torture to the victim. Smith v. State, 249 Ga. 228 (1982). Under the circumstances, the Respondent submits that this allegation is without merit.

L. THE IMPOSITION OF THE DEATH PENALTY UPON PETITIONER DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

The Petitioner alleges that the infliction of the death penalty constitutes cruel and inhuman punishment. Specifically, he alleges that the Eighth Amendment forbids the execution of mentally retarded persons such as the Petitioner alleges he is.

The record before this Court shows that the Petitioner was afforded a psychological examination, but that the evidence presented at trial did not support the theory that he was insane. However, the trial court did charge the jury on the law of insanity, although the jury chose to reject this verdict. On direct appeal, the Georgia Supreme Court reviewed the record in this case relative to any evidence of insanity, which could support a finding of not guilty by reason of insanity. The Supreme Court held:

> The most the evidence shows is that Smith has a low I.Q., possibly equivalent to that of an eleven year old child. There is a vast difference between low intelligence and inability to distinguish between right and wrong. Indeed, the psychiatric testimony in

> this case indicates that ten percent of the population has an intelligence level not greater than Smith's.

Smith v. State, supra, at 231.

The Respondent respectfully submits that the jury rejected the argument that the Petitioner was insane, and while there was evidence that the Petitioner had a low I.Q,. such is not a legal defense to murder in the State of Georgia and does not justify the allegation that the death penalty is cruel and unusual punishment.

M. PETITIONER WAS AFFORDED AN ADEQUATE APPELLATE REVIEW OF HIS DEATH SENTENCE.

The Petitioner next alleges that he was denied an adequate appellate review of this death sentence required by law. Specifically, he alleges that the Georgia Supreme Court did not comply with the requirement set forth under Ga. Code Ann. § 27-2537, now codified as O.C.G.A. § 17-1035, which charges that Court with reviewing any sentence of death. The Petitioner alleges that the Georgia Supreme Court's review was a limited one, which allegedly failed to consider the mitigating circumstance of Petitioner's mental retardation.

The Respondent respectfully submits that Ga. Code Ann. § 27-2537; O.C.G.A. § 17-1035 was complied with in this case. In its opinion, the Georgia Supreme Court reviewed the death sentence in this case, considering the aggravating circumstance found by the jury and the evidence concerning the crime and the defendant. This case was tried under the Unified Appeal Procedure and the Georgia Supreme Court reviewed independently the record and the transcript and found no significant error other than those enumerated by the Petitioner. The Georgia Supreme Court, after reivewing the record, found that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and that evidence supporting the aggravating circumstance found by the

APPENDIX E

IN THE SUPREME COURT OF GEORGIA

No. _____

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Applicant,

v.

ROBERT O. FRANCIS,
Warden, Georgia Diagnostic
and Classification Center,

Respondent.

APPLICATION FOR CERTIFICATE OF
PROBABLE CAUSE

Stephen B. Bright
600 Healey Building
57 Forsyth Street, N.W.
Atlanta, Georgia 30303

Stephen H. Glickman
ZUCKERMAN, SPAEDER, MOORE,
TAYLOR & KOLKER
1201 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Applicant

B. Infliction of the Death Penalty on Petitioner Constitutes Cruel and Unusual Punishment.

The infliction of the death penalty on a retarded human being such as petitioner takes this case out of the mine run of capital cases. It forces this Court to confront whether the Constitution tolerates imposing the most merciless and irrevocable of punishments on that well-recognized class of people who, from inherent mental defect and not any moral fault, are least able to understand and obey society's strictures. Specifically, the question is whether the cruel and unusual punishment clause of the Eighth Amendment forbids the execution of mentally retarded persons such as petitioner.

The Supreme Court most recently held a death sentence cruel and unusual in Enmund v. Florida, ____ U.S. ____, 102 S.Ct. 3368, 73 L.Ed 2d 1140 (1982). There the Court held that the death penalty could not constitutionally be imposed on one who aided and abetted a robbery during which murder was committed by others but did not himself kill or intend to kill. Enmund's analysis of the cruel and unusual punishment clause in those circumstances establishes the controlling principles here.

To begin with, the issue is not whether death is a disproportionate penalty for murder, but rather whether it is a valid penalty for the particular offender. Enmund v. Florida, 102 S.Ct. at 3377, 73 L.Ed 2d at 1152. "The focus must be on his culpability, ... for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' ... which means that we must

focus on 'relevant facets of the character and record of the individual offender.'" Id. (citations omitted; emphasis in the original).

Death is a disproportionate punishment for the particular offender in question if the legitimate purposes of capital punishment would not be substantially fostered by its infliction on persons like him. Two purposes of the death penalty have been accepted by the Supreme Court: retribution, and deterrence of capital crimes by prospective offenders. Gregg v. Georgia, 428 U.S. at 183. "Unless the death penalty when applied to those in [the defendant's] position measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." Enmund, 102 S.Ct. at 3377, 73 L.Ed.2d at 1152 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

The Court struck down the death penalty in Enmund's case because neither deterrence nor retribution would have been significantly furthered by its infliction. As we shall see, its mode of analysis is highly pertinent to petitioner's case. Regarding deterrence, the Court considered the effect on those similarly situated to Enmund, and declared itself "quite unconvinced" that the possibilty of capital punishment for vicarious felony murder would deter those who do not contemplate the killing. Id., 102 S.Ct. at 3377, 73 L.Ed 2d 1152-1153. The Court quoted with approval Justice Frankfurter's observation in Fisher v. United States, 328 U.S. 463, 484 (1946), that "capital punishment

can serve as a deterrent only when murder is the result of premeditation and deliberation." Id.

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The application of the foregoing principles to petitioner's situation requires first that his relevant personal characteristics be identified and described. As in Enmund, the focus must be on petitioner's mental condition and its relation to his offense. Then it is necessary to weigh the efficacy of capital punishment for people like petitioner in achieving the goals of retribution and deterrence.

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Shiver, psychometrist for the Oglethorpe County school system, and records accompanying that affidavit.) Dr. Fisher's affidavit is supplemented and corroborated by the affidavits of numerous relatives, friends and acquaintances of petitioner.

The uncontradicted portrait of petitioner which emerges when all the evidence is considered is of a mentally impaired young man whose retardation has had profound behavioral consequences. Any notion that petitioner is merely a "slow learner" is just wrong.

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Noodle is not bright. Sometimes when you talked to him, it was like he was in another world. He had trouble paying attention.... Even though he had very limited mental abilities, he did the best he could. (Affidavit of Virginia Smith) (no relation).

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he was slow.... (Affidavit of Shirley Ann Smith, sister.)

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William had problems as a child, however, because he was severely limited in his ability to understand, to follow directions and to do things that most children can do. William was never able to learn to do things as soon as his brothers and sisters, and, as they grew older, the other children were able to do things that William was never able to do.

When William was at home, after school or on weekends, I would ask him to help me clean the house. William would try and he could do things like sweep, but he could not do things like make

> the bed. When he got older, about age 16 or 17, my husband, who has been a meat cutter all of his adult life, tried to teach William how to cut meat and wrap it. William was never able to wrap a package of meat. The younger boys would come in and my husband would cut the meat, and show how to wrap it up and then label it so that you would know what cut of meat was inside the wrapping, but William, or "Nocdle" as we all called him, was never even able to wrap the paper around the cuts the right way. Since he was never able to learn to wrap the meat, my husband never attempted to teach him how to cut it....
>
> William was not smart enough to keep up with the other students in school. He was not able to read very well at all, he could not do arithmetic, and could not spell words. He could not say his ABC's, and I still do not know if he is able to say them all the way through. Although William was in the class for educable mentally retarded at school for a while, he was never given any special training to deal with his mental limitations and no preparation for dealing with life as an adult with his limitations. William was frustrated with school because he could not learn and because he was so much bigger than the other students in his class. Finally, when he got old enough, he just gave up on school and stopped going.
>
> William was very quiet and a lot of people did not know how limited he was. But he could not do anything that was complicated or follow directions. He could not get a driver's license. William does not have the good judgment that some of his brothers and sisters have or that other people have. He had to be in special classes at school, because he was not able to keep up with the other students. William has always needed more attention and more guidance than other children I have had. (Affidavit of Mary Smith, mother.)

The other character traits reported in the affidavits indicate some behavioral consequences of petitioner's mental impairment. He is repeatedly described as being extraordinarily quiet and withdrawn, passive and docile,

submissive to authority and happiest doing simple and repetitive tasks, however back-breaking. Another noteworthy refrain in the affidavits is that he always kept his problems and worries bottled up inside himself. (See, e.g., affidavits of Denise Bolton, Marlene Cofer, Willie B. Henson, Mary Smith, Shirley Ann Smith, Willie David Smith and Sara Taylor.)

Dr. Fisher's clinical evaluation elaborates on the functional consequences of petitioner's mental defects. His conclusions, which are fully supported by the lay witness observations, are summarized in his affidavit as follows:

> The presence of this level of mental retardation indicates much more than just slow learning; it indicates impaired social judgment, impaired ability to understand or acknowledge the consequences of behavior, impaired ability to make rational judgments, increased dependency features, susceptibility to confusion and anxiety in stressful situations, tendency toward more impulsive behavior (this often based on the condition in which the retarded person has more frequent frustrations with the many situations that are confusing and complex to him or her, without the ability to appropriately vent that frustration) and some diminished capacity to distinguish between right and wrong. This latter category is different from an inability to distinguish between right and wrong that may be the case where the insanity issue is involved.)

(Fisher Affidavit, page 11; see also pages 8, 13-14, 16.)

Dr. Fisher's description of petitioner satisfies the statutory definition of a mentally retarded person as "a person having a significantly sub-average general intellectual functioning existing concurrently with deficits in

adaptive behavior which originates in the developmental period." Off. Code of Ga. Ann. §37-4-1(r); see also §17-7-131, defining "mentally ill" in almost identical language.

Dr. Fisher also explains how the foregoing features of petitioner's personality contributed to the commission of the offense. It will be recalled that at his trial there was testimony that in the days immediately before the crime, petitioner appeared unusually despondent and agitated. (Tr. at 350-358.) No explanation for this mental state was offered at trial, however. Dr. Fisher explains that petitioner had just suffered two especially traumatic blows to his self-esteem which were directly related to his impulsive outburst of violence:

> [T]he following features seem especially noteworthy in his description of situational components in the days surrounding the commission of the crime. First, it should be pointed out that one of the most important people in William's life at this time was his girlfriend. He described her as the first person near his own age who had really cared about him, and this had taken on extraordinary importance in his life. With this in mind, the fact that he had broken up with his girlfriend in the two days previous to the crime appears significant. His own description of this event included his feelings of total frustration and confusion over what to do about the breakup.
>
> A second factor revolves around the destruction of William's car the day before the crime. This automobile was his first material possession of consequence, and a major feature relating to his self-esteem and feelings of self-worth. It should be noted that at the time the car was destroyed he did not have a license, and the car was not paid for. This

> served to further heighten his level of frustration and resultant confusion because of his inability to deal with that frustration....
>
> If one was to rank the two most important things in William Smith's life, these would probably have been his girlfriend and his car. To have both of these taken away at the same time would have been traumatic for anyone; however, with his primary psychological dynamics including major limitations in his ability to deal with frustration, as well as easily formed frustration and confusion over typical life experiences not confusing to those not mentally retarded, these events take on special significance. For a person with William's level of retardation, it is important to have a simple, straightforward, and consistent foundation upon which to operate. In his case, the two critical ingredients of this somewhat shaky foundation had been removed, which brought into play the limitations connected with his retardation, much more than would have been the case for a person with normal intellectual functioning, frustration tolerance, and ability to not become confused by outside stimuli.

(Fisher Affidavit, pages 8-10.)

The characterization of petitioner's offense as just another murder with a crass pecuniary motive is thus altogether too simplistic. It is more fairly perceived as the tragically impulsive outburst of a normally docile, mentally handicapped young man in response to a level of inner turmoil, frustration and confusion which was beyond his impaired ability to resolve and control. (Of course, because petitioner's trial counsel neglected to investigate and prepare, he was unable to convey this understanding to the jury.)

Applying now the Supreme Court's analysis of the cruel and unusual punishment clause in Enmund, application of the death penalty to retardates like petitioner measurably serves neither deterrence nor retribution. As far as deterrence is concerned, retardates' behavioral disorders and intellectual deficiencies render them largely immune from the threat of punishment. As petitioner's case illustrates, their impulsivity and intellectual impairment virtually rule out the kind of fully contemplated and coolly calculated crime for which the threat of the death penalty can have a deterrent effect. Enmund, 102 S.Ct. at 3377-3378, 73 L.Ed 2d at 1152-1153.[8/] The retardate's diminished ability to project into the future and rationally contemplate the consequences of his acts further reduces the likelihood that he will appreciate and be restrained by the prospect of punishment, or that he will be influenced by variations in the degree of punishment. See Sternlicht and Deutsch, Personality Development and Social Behavior in the Mentally Retarded 80 (1972); Grigg, Criminal Behavior of Mentally Retarded Adults, 52 Am. J. of Mental Deficiency 370, 371, 374 (1948).

Retribution is an even poorer justification for executing retardates such as petitioner, depending as it does on the degree of their personal culpability. Courts have

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8/ See also Gregg v. Georgia, 428 U.S. at 185-186, distinguishing "murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect," from those who perpetrate "carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act."

long recognized in capital cases that the mentally retarded are not to be held to normal standards of accountability. E.g., State v. Hall, 126 Neb. 295, 310, 125 N.W.2d 918, 927 (1964) (reducing death sentence to life imprisonment where defendant had an I.Q. of 64); State v. Behler, 65 Idaho 464, 475-476, 146 P.2d 338, 343 (1944) (sentence of death reduced to life imprisonment because defendant "possesses a very low order of intelligence"); Commonwealth v. Green, 396 Pa. 137, 148, 151 A.2d 241, 247-248 (1959) (death penalty vacated in light of defendant's youth and dull normal intelligence); see also Woods v. State, 214 Ga. 546, 105 S.E.2d 896, 897 (1958) (jury instructed that weakmindedness, though no defense to the crime, may be grounds for recommendation of mercy). In virtually every state with a capital sentencing scheme, mental retardation is recognized in one way or another to be a mitigating factor in sentencing. The universal recognition that retardates are less culpable than normal people is reflected in Dr. Fisher's actual experience and research, see Fisher Affidavit at 13.

The complex of reasons why retardates are less responsible for their antisocial behavior than ordinary people is summarized in Dr. Fisher's affidavit. Persons with petitioner's degree of mental handicap suffer as a consequence "impaired social judgment, impaired ability to understand or acknowledge the consequences of behavior, impaired ability to make rational judgments, increased dependency features, susceptibility to confusion and anxiety in stressful situations, tendency toward more

impulsive behavior... and some diminished capacity to distinguish between right and wrong." Fisher Affidavit at 11. Dr. Fisher's description is strongly supported in the literature. On the retardate's special proneness to react immediately and violently to the urges of the moment, see, e.g., Bromberg, The Mold of Murder 202 (1961) (tendency of retardates to "react in a blinding flash of vengeance" against frustration and humiliation); Glueck, Mental Disorder and the Law 334-335 (1925) (retardate's defective control of instinctive behavior may lead to serious crimes of violence); Sternlicht and Deutsch, supra at 58 (failure of defense mechanisms of repression and inhibition impair retardates' ability to control aggressive and hostile impulses). As the last-named authors note,

> [The] retarded individual is especially prone to committing deviant acts because he will be subject to weak and ineffective functioning not only in the realm of conscience and values but in the realm of judgment and common sense as well. It is the latter deficit, in fact, which creates perhaps the more immediate and pervasive of the retardate's problems in the area of deviant and antisocial conduct.

Id., at 81. See also Tredgold and Soddy, Textbook of Mental Deficiency (10th ed. 1963) 252 (retardate may evince an understanding of the "nature" of the act -- that it is forbidden -- without fully understanding its "quality").

In short, the infliction of the death penalty on mentally retarded offenders such as petitioner does not serve either of the two recognized purposes of capital punishment. It is therefore "nothing more than the purposeless and needless imposition of pain and suffering,"

Coker v. Georgia, 433 U.S. at 592, which the Eighth and Fourteenth Amendments forbid.

APPENDIX F

IN THE SUPREME COURT OF GEORGIA

No. 41276

WILLIAM ALVIN SMITH,

Appellant,

v.

ROBERT O. FRANCIS,
Warden, Georgia Diagnostic
and Classification Center,

Appellee.

On Appeal From
The Superior Court of Butts County

BRIEF FOR APPELLANT

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ATTORNEYS FOR APPELLANT

II. Infliction of the Death Penalty on a Mental Retardate Such as Appellant Violates the Eighth Amendment's Ban on Cruel and Unusual Punishment.

The infliction of the death penalty on a retarded human being such as appellant takes this case out of the mine run of capital cases. It forces this Court to confront for the first time whether the Eighth Amendment tolerates imposing the most merciless and irrevocable of punishments on that small[9/] but well-recognized class of people who, from inherent mental defect and not any moral fault, are least able to understand and obey society's strictures.

The application of capital punishment to retardates like appellant is forbidden if it will not measurably contribute to the goals of retribution or deterrence. Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368, 73 L.Ed. 2d 1140 (1982). As far as retribution is concerned, the mentally retarded are significantly less morally culpable than ordinary people; but it is precisely upon the existence of reasonable moral responsibility that retribution is founded. Deterrence is also not served, for retardates'

8/ [Footnote continued]...

(i) Keeble handled the direct appeal incompetently, e.g., by neglecting to raise substantial legal issues and by making factual assertions totally unsupported by the record.

9/ Approximately 2.2% of the population suffers from retardation as substantial as appellant's (Fisher Affidavit at page 17).

impairments prevent the threat of capital punishment from influencing their impulsive and ill-reasoned behavior. The infliction of the death penalty on a retarded offender such as appellant is therefore "nothing more than the purposeless and needless imposition of pain and suffering," Coker v. Georgia, 433 U.S. 584, 592 (1977), which the Constitution absolutely forbids.

III. Appellant's Waiver of His Privilege Against Self-Incrimination Was Invalid.

When appellant was arrested, he waived his privilege against self-incrimination and gave a statement that was used against him at trial. The validity of his waiver depends not only on whether it was voluntary, but also on whether it was knowing and intelligent. Edwards v. Arizona, 451 U.S. 477, 482 (1981). The court below erroneously found appellant's waiver valid by completely ignoring the uncontradicted evidence to the contrary. Thus, for example, the court mistakenly said in its order that there was "no evidence other than some testimony concerning his being slightly retarded to show that [appellant] did not understand his rights when read to him." (Order at pages 19-20.) In fact, the evidence was overwhelming that, in light of his mental and educational limitations and the circumstances of his interrogation, appellant's waiver was invalid. See appellant's Application for Certificate of Probable Cause at pages 46-53.

APPENDIX G

IN THE SUPREME COURT OF GEORGIA

WILLIAM ALVIN SMITH,	*	
	*	CASE NO. 41276
Appellant,	*	
	*	ON APPEAL FROM THE
v.	*	SUPERIOR COURT OF
	*	BUTTS COUNTY
ROBERT O. FRANCIS, WARDEN,	*	
	*	HABEAS CORPUS
Appellee.	*	

BRIEF ON BEHALF OF THE APPELLEE BY THE ATTORNEY GENERAL

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Enumerations of Error V, VI, VII, VIII, IX, XI, XII and XIV.) As will be shown below, the habeas corpus court correctly determined that none of these allegations were meritorious, and could not serve as the basis for any allegations of ineffective assistance. (See Order, pages 5-17).

Therefore, for all the above and foregoing reasons, Appellant's Enumeration of Error I is without merit.

B. THE APPELLANT'S DEATH SENTENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT.
(Enumeration of Error II).

Appellant contends that, because of his alleged mental defects, the imposition of the death penalty in his case violates the Eighth Amendment. Appellee submits that there is no basis or merit to this allegation.

This Court has found no impediment to the imposition of a death sentence where it is alleged that the accused has a low mental level and social maladjustment, especially when, as in this case, evidence of these issues has been presented to a jury to be considered in mitigation and extenuation. See Corn v. State, 240 Ga. 130, 141, 240 S.E.2d 694 (1977). See also Wallace v. State, 248 Ga. 255, 282 S.E.2d 325 (1981).

Therefore, for all the above and foregoing reasons, Appellee submits that Appellant's Enumeration of Error II is without merit.

C. THE HABEAS CORPUS COURT CORRECTLY DETERMINED THAT PETITIONER'S STATEMENTS WERE FREELY AND VOLUNTARILY GIVEN. (Enumerations of Error III and IV).

Appellant contends that his incriminating statements were involuntary due to his alleged mental retardation and because he was held for an unnecessarily prolonged detention period following his arrest and prior to being presented to a magistrate or appointed counsel. Appellee submits that the habeas corpus court correctly determined that these allegations have no merit.

Initially, Appellee notes that the decision of a trial court regarding the voluntariness of a statement and the admissibility thereof will not be disturbed unless the trial court's decision was clearly erroneous. Cox v. State, 248 Ga. 713, 285 S.E.2d 687 (1982).

The trial court in the Appellant's case, as noted by the habeas corpus court, reviewed the circumstances surrounding the giving of the Appellant's statements, and found the Appellant's statements freely and voluntarily

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CERTIFICATE OF SERVICE

I, STEPHEN H. GLICKMAN, a member of the Bar of this Court, do hereby certify that I have served a copy of Petitioner's Reply to Respondent's Brief in Opposition upon the respondent this 8th day of July, 1985, by mailing a copy with first-class postage prepaid to his counsel of record at the following address:

William B. Hill, Jr., Esquire
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334

Stephen H. Glickman
STEPHEN H. GLICKMAN

EDITOR'S NOTE

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(5)

SUPREME COURT OF THE UNITED STATES

WILLIAM ALVIN SMITH *v.* ROBERT O. FRANCIS, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 84–6780. Decided October 21, 1985

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN, dissenting.

Adhering to my views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting from denial of certiorari.

I would vacate the judgment of the Georgia Supreme Court insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). The petitioner has presented an important question concerning the Eighth Amendment's ban on cruel and unusual punishment as applied to the execution of a mentally retarded person.

I

The petitioner is mentally retarded, with an IQ of 65 and mental abilities roughly equivalent to those of a ten-year-old child. He was tried for the murder of one Dan Turner, a friend of the petitioner and his family. There were no eyewitnesses to the crime. The petitioner had gone into Turner's grocery store to buy some cigarettes. The petitioner testified at trial that he grabbed Turner when the latter opened the cash register. Turner reacted by picking up a hammer, and the petitioner then stabbed him and hit him with the hammer after it fell from the victim's hand. Peti-

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tioner took money from the cash register and Turner's wallet and fled.

Petitioner turned himself in to the police and gave a lengthy statement in which he admitted stabbing Turner. When asked about the reasons for his actions, petitioner stated that he had wanted to get money. At trial, however, petitioner stated that he had not entered the store intending to rob Turner, and did not know why he had grabbed Turner as the latter was getting petitioner's cigarettes.

A psychiatrist who examined the petitioner stated that the petitioner showed considerable remorse in discussing the murder. Petitioner testified at trial that he "didn't mean to kill Mr. Dan," but had gotten "carried away" after he saw the victim wielding the hammer in what petitioner interpreted as a threatening manner. There was evidence that the petitioner was under considerable stress in the days preceding the murder. Petitioner's counsel argued that petitioner was insane or, at minimum, lacked the requisite mental intent because of his retardation. Nevertheless, the jury found petitioner guilty of malice murder and armed robbery and sentenced him to death.

II

In *Furman* v. *Georgia*, 408 U. S. 238, 363–369 (1972) (MARSHALL, J., concurring), I concluded that the death penalty was "morally reprehensible" to contemporary society based, in part, on its discriminatory imposition. Statistically, it was "evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society." *Id.*, at 365–366 (footnote omitted). Petitioner suffers the unfortunate distinction of meeting each of these criteria. His case, like so many others coming before this Court, convinces me of the continuing validity of my observations in *Furman*.

I need not recount here our country's shameful history with respect to the mentally retarded. See *City of Cleburne* v. *Cleburne Living Center*, —— U. S. —— (1985) (MAR-

SHALL, J., concurring in the judgment in part and dissenting in part). I believe, however, that the courts bear a special responsibility when faced with the possible execution of a member of a group that has been subject for so long to irrational social stigma.[1] This is particularly true in the instant case, because the petitioner's handicap necessarily diminishes his culpability. A mentally retarded person who is susceptible to confusion and impulsive reaction when put in a stressful situation[2] is the very opposite of the cold-blooded, calculating killers that populate this Court's opinions validating the death penalty. See, *e. g.*, *Gregg* v. *Georgia*, *supra*, at 185–186 (opinion of Stewart, POWELL, and STEVENS, JJ.).

This Court has demanded that a capital sentencing scheme provide, at a minimum, a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not," *Furman*, *supra*, at 313 (WHITE, J., concurring); see *Godfrey* v. *Georgia*, 446 U. S. 420, 427–428 (1980) (plurality opinion). In this case, the mechanical application of the Georgia sentencing scheme undermined one purpose that the Court has determined to underlie such procedures—to reserve the penalty of death for the most culpable killers, thus satisfying society's "instinct for retribution," *Gregg* v.

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[1] It cannot be denied that American communities have traditionally shown a strong desire to be rid of the mentally retarded in any way possible. See *Cleburne*, *supra*, at —— (retarded subjected during end of nineteenth and beginning of twentieth centuries to a "regime of state-mandated segregation and degradation . . . that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow.") See also *Buck* v. *Bell*, 274 U. S. 200, 207 (1927) (upholding compulsory sterilization as alternative to "waiting to execute degenerate offspring for crime"); *Halderman* v. *Pennhurst State School & Hospital*, 446 F. Supp. 1295, 1299–1300 (ED Pa. 1977) (noting history of institutionalization of mentally retarded), aff'd in part and rev'd in part, 612 F. 2d 84 (CA3 1979), rev'd, 451 U. S. 1 (1981).

[2] A psychiatrist who examined the petitioner testified that he exhibits these characteristics. See Affidavit of Dr. Fisher, App. H to Pet. for Cert. The characteristics are typically found in the mentally retarded. See M. Sternlicht & M. Deutsch, Personality Development and Social Behavior in the Mentally Retarded 81–82 (1972).

Georgia, *supra*, at 183 (quoting *Furman*, *supra*, at 308 (Stewart, J., concurring)).[3] The execution of a mentally retarded person serves this retributive function extremely poorly, because the level of "personal responsibility and moral guilt," *Enmund* v. *Florida*, 458 U. S. 782, 801 (1982), is so much lower than in the case of a fully competent person

[3] Courts have often shown reluctance to impute to a retarded defendant the necessary culpability to uphold a sentence of death. See, *e. g.*, *State* v. *Hall*, 176 Neb. 295, 309–310, 125 N. W. 2d 918, 926–927 (1964) (exercising its statutory prerogative to "reduce the sentence rendered . . . when in its opinion the sentence is excessive," court concluded that where the defendant, had an I. Q. of 64, "reduction of the death penalty to one of life imprisonment is warranted"); *State* v. *Behler*, 65 Idaho 464, 474–475, 146 P. 2d 338, 343 (1944) ("Undoubtedly, one possessing a normal mind should be held to a full, strict accountability for his conduct, but, should a person with a pronounced subnormal mind be held to the same high degree of accountability?"); *Commonwealth* v. *Green*, 396 Pa. 137, 151 A. 2d 241 (1959) (vacating death sentence where sentencer had failed to consider mitigating factors, including defendant's youth and subnormal intelligence). See also *Thompson* v. *State*, 456 So. 2d 444, 448 (Fla. 1984) (trial judge erred in overriding jury recommendation of life imprisonment on the grounds that no mitigating circumstances existed, where "appellant's mental retardation could have been considered by the jury as a basis for recommending life imprisonment"). Legislatures have also acknowledged that the retarded are less deserving of the death penalty than other offenders. Many state statutes make mental disease or defect at the time of the criminal act a mitigating factor. See Ark. Stat. Ann. § 41–1304(3) (1977); Cal. Penal Code § 190.3(h) (West Supp. 1985); Conn. Gen. Stat. § 53a–46a(f)(2) (Supp. 1985); Ind. Code § 35–50–2–9(c)(6) (Supp. 1985); Ky. Rev. Stat. § 532.025(2)(b)(7) (1984); La. Code Crim. Proc. Ann., Art. 905.5(e) (West 1984); Md. Ann. Code, Art. 27, § 413(g)(4) (Supp. 1985); Neb. Rev. Stat. § 29–2523(2)(g) (1979); N. J. Stat. Ann. § 2C:11–3(c)(5)(d) (West 1982); Ohio Rev. Code Ann. § 2929.04(B)(3) (1982); Tenn. Code Ann. § 39–2–203(j)(8) (1982); Wash. Rev. Code § 10.95.070(6) (Supp. 1985). See also Ala. Code § 13A–5–51(6) (1982); Ariz. Rev. Stat. Ann. § 13–703(G)(1) (Supp. 1984); Fla. Stat. § 921.141(6)(f) (1985); Miss. Code Ann. § 99–19–101(6)(f) (Supp. 1984); Mo. Rev. Stat. § 565.032(3)(6) (Supp. 1985); Mont. Code Ann. § 46–18–304(4) (1983); N. H. Rev. Stat. Ann. § 630:5(II)(b)(4) (1983); N. M. Stat. Ann. § 31–20A–6(c) (1981); N. C. Gen. Stat. § 15A–2000(f)(6) (1983); 42 Pa. Cons. Stat. § 9711(e)(3) (1982); S. C. Code § 16–3–20(c)(b)(6) (1985); Va. Code § 19.2–264.4(B)(iv) (1983); Wyo Stat. § 6–2–102(j)(vi) (1985).

who commits the same crime.[4] As applied to the petitioner, the death penalty is "nothing more than the purposeless and needless imposition of pain and suffering," *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion), and therefore unconstitutional.

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[4] Recognizing the greatly lower culpability of the mentally defective is certainly not novel; Blackstone notes that "by the law . . . ever since the time of Edward the Third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days as by the strength of the delinquent's understanding and judgment." 4 W. Blackstone, Commentaries *23.